Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID McMAHON,

Petitioner,

v.

ALBANY UNIFIED SCHOOL DISTRICT, JOE DALE HUDSON, ALAN RIFFER, DIANNE McNENNY, MARSHA SKINNER, and PEGGY THOMSEN,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the recognized speaker in a meeting deemed to be a public forum be arrested for disrupting the meeting by violating "implicit customs" of the meeting, without first being warned he is in violation of those unwritten practices? Is not a criminal statute which prohibits such conduct too vague to stand up to First Amendment protections?

2. Even if such a warning were given, is not such a statute unconstitutionally vague because it vests virtually complete discretion in the hands of meeting officials to determine whether the speaker has violated implied customs of the meeting?

3. Does one meeting official's statement to another school official that the speaker's conduct is an "absolutely inappropriate" activity, and directing that other official to call the police, sufficiently warn the speaker that he is out of order and subject to arrest unless he ceases his conduct?

4. Does the "clear and present danger" rule apply to prevent the speaker's arrest under such circumstances?

5. Is an arrest the least restrictive means consistent with free speech to further a government interest in keeping trash from being displayed on the floor of a schoolroom? Would a request to the speaker to conclude his remarks and pick up the trash have been sufficient to further that interest?

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

David McMahon respectfully petitions for a writ of certiorari to the California Court of Appeal for the First District to review the court's decision affirming a jury verdict in favor of defendants on his First Amendment claim. He contends that the evidence established a prima facie case of false arrest, which was not rebutted by the defendants, and he was entitled to a directed verdict on the issue of liability.

OPINION BELOW

The decision of the California Court of Appeal appears as Appendix A, and is reported at 104 Cal.App.4th 1275, 129 Cal.Rptr.2d 184 (2002). The order by the California Supreme Court denying a petition for review appears as Appendix B, and is unreported.

JURISDICTION

Petitioner sought review of the decision of the California Court of Appeal through a petition for discretionary review to the California Supreme Court. The California Supreme Court denied review on March 19, 2003. This petition is filed within 90 days of that order, and is timely pursuant to Rule 13.1 of this Court.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a), as a petition for a writ of certiorari to review the judgment of the highest court of a State where

a right is claimed by petitioner under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution:

> Congress Shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

Section 403 of the California Penal Code:

> Every person who, without authority of law, willfully disturbs or breaks up any assembly or meeting that is not unlawful in its character,

other than an assembly or meeting referred to in Section 302 of the Penal Code or Section 18340 of the Elections Code, is guilty of a misdemeanor.

STATEMENT OF THE CASE

David McMahon and his family lived across the street from Albany High School. As his two sons approached school age, he began attending school board meetings, voicing his concerns about earthquake safety, vehicle traffic, and the litter which the students deposited in the neighborhood.

When school officials took no action with respect to the trash generated by the students (and indeed denied responsibility for it), McMahon began picking up the trash himself. In addition to numerous paper products, he found empty beer bottles, and little inch-square plastic baggies, which, upon inquiry, the police told him were drug paraphernalia used as "drug containers." (RT 318.)[1]

On April 30, 1996, Mr. McMahon attended another school board meeting, in the multi-purpose room at Cornell School. Still trying to spur the Board to action on the trash problem, he brought with him a number of 13-gallon plastic kitchen garbage bags containing some of the litter he had picked up in the neighborhood. Each bag contained at least one empty alcohol bottle and a little plastic baggie.

[1] Matters which are of record but which are not directly referenced in the opinion of the California Court of Appeal are found in the Reporter's Transcript (RT) and the Clerk's Transcript (CT).

The remainder of the trash was described as "papers, perhaps bottles" (RT 941); "wadded up pieces of paper" (RT 750); "[b]ottles, paper cups, trash" (RT 198, 218); "a piece of brown paper, like brown bag . . . a Styrofoam cup and then maybe there was a bottle." (RT 181.) None of the bags contained anything hazardous.

All California public agencies are required by law to set aside part of their agenda to allow the public to comment on matters of public concern, Calif. Gov. Code § 54954.3(a), and the Albany School Board included such an item on their agenda.

When the chair opened the floor for public comment, the first speaker, a woman told her concerns of how her daughter had obtained drugs at school, and how her daughter had gone from an A-student to failing grades. (CT 244-245.)

The chair then recognized Mr. McMahon. He spoke about earthquake safety, about traffic and about the petition he had been circulating with regards to the new middle school, and then stated he wanted to talk about trash. He brought some of the bags of trash he had collected up to the microphone.

He opened up a tarp and started to put some of the trash on it. (RT 334.) A person in the audience stated, "Excuse me, kids are in this room tomorrow, and I hope you're not planning on emptying trash out here on the floor." Plaintiff replied that he certainly was, and the

person[2] said, "Well I hope you're prepared to clean it up." (CT 614, 629; RT 467-468.)

At that point a board member, McManus, turned to School Superintendent Hudson, and told him, "Mr. Hudson, will you call the police, because this is an absolutely inappropriate activity to do in – in a schoolroom, because – " (1 CT 615, 629.) McManus then moved, there was a second, and the Board voted, to adjourn the meeting. (1 CT 615, 629.) Superintendent Hudson and the board members filed out of the room, and Hudson called the police. (RT 243, 399.)

While plaintiff waited for the police to come, he and the audience discussed community problems and the school officials' indifference to some of those problems. (RT 403; CT 615-617, 629-632.) During the discussion with the audience he first mentioned that the trash contained what he referred to as "drug paraphernalia." (CT 273.)

Several minutes later the police arrived. Plaintiff was still talking with the audience, with his bag of trash spread out behind him on the tarp.[3] (RT 197-198.)

Hudson met the police. At that time he told them that McMahon had exceeded his allotted time to speak and had

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[2] The person in the audience, unknown to Mr. McMahon, was the school principal. However, that night he was merely there as a member of the audience. (RT 919.)

[3] The responding police officers and several members of the audience testified that the trash was all on the tarp. (RT 154.) One of defendants' witnesses testified that some of it spilled off the tarp onto the floor. (RT 938.) We will assume for purposes of this petition that some of the trash did spill onto the floor.

refused to give up the microphone, despite having been asked several times to do so. (RT 192, 234, 235.) Hudson later admitted at trial that nothing like that had happened at all.[4] (RT 235.) He also admitted at trial that there were no time limits on speakers at that time. (RT 245.)

California law requires that to make a lawful arrest for a misdemeanor, the offense must have been committed in the presence of the person making the arrest. App. 6; Calif. Pen. Code §§ 836(a)(1), 837, ¶ 1. Sgt. Clemons told Hudson that if McMahon had in fact refused to relinquish the microphone, that action appeared to be a misdemeanor committed not in the officers' presence, and if Hudson really wanted plaintiff arrested, he would have to make a citizen's arrest. (RT 195, 227.)

Hudson thereupon made a citizen's arrest of plaintiff for willfully disturbing a public meeting. The police then received plaintiff into custody, see Calif. Pen. Code §§ 847, 142(a), by going up to plaintiff where he was speaking, handcuffing him, leading him out of the building, and taking him to jail. (RT 405-407.)

Following plaintiff's arrest, Hudson and others picked up the tarp and the trash and put it in a receptacle at the back of the room. (RT 942.) The Board then "reconvened" the adjourned meeting. (CT 277.)

After a few hours in jail McMahon was "cited out," and released. (RT 410.) No charges were filed against him.

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[4] This was after McMahon had obtained a copy of the official tape recording of the Board meeting.

This lawsuit followed, and the case went to trial on the false arrest/false imprisonment cause of action. The first trial ended in a hung jury. The second trial, after McMahon's motion for a directed verdict was denied, ended in a judgment on the verdict for the defendants. App. 5.

REASONS FOR GRANTING THE PETITION

I.

THE DECISION BY THE CALIFORNIA COURT OF APPEAL CHILLS THE RIGHT OF PEOPLE TO SPEAK OUT AT PUBLIC MEETINGS FOR FEAR OF ARREST.

A.

McMahon Was Arrested Without a Warrant, Which Fact Made Out a Prima Facie Case of an Unlawful Arrest. The Defendants, to Avoid a Directed Verdict, Had to Prove That McMahon Had Actually Committed a Criminal Offense.

Under California law, a peace officer may arrest for probable cause, but for a citizen's arrest to be legal, a misdemeanor offense must have "actually been committed or attempted in his presence." *Cervantez v. J. C. Penney Co.*, 24 Cal.3d 579, 587, 595 P.2d 975 (1979). An arrest without a warrant creates a prima facie case of wrongful arrest, and the burden of proof shifts to the defendants to justify the arrest. *Id.* at 592.

The California Court of Appeal properly recognized that it was the defendants' burden to justify the arrest. App. 6. This shift in the burden means that if there was any substantial gap in the evidence necessary to show that

an offense was actually committed, McMahon was entitled to a directed verdict.

B.

As Interpreted by California's Highest Court in 1970, Penal Code Section 403 Required That Before a Person Exercising First Amendment Rights at a Public Meeting Can Be Lawfully Arrested, Meeting Officials Must First Warn the Person He Is in Violation of Meeting Customs and Request Him to Cease His Conduct.

California Penal Code § 403 prohibits willfully "disturbing" a public meeting.

The language of the statute, *supra*, pp. 2-3, is extremely broad in its literal terms, and its potential for infringing on First Amendment rights is apparent. Some 30 years ago the California Supreme Court observed that "if the section were literally applied with the breadth of coverage that its terms could encompass, the statute would be constitutionally overbroad and could not stand." *In re Kay*, 1 Cal. 930, 941, 83 Cal. Rptr. 686, 464 P.2d 142 (1970).

The *Kay* court therefore set about narrowing the legal interpretation of the statute so it would meet First Amendment requirements. As interpreted by the California high court, a person violates the statute only if he willfully violates explicit rules or implied customs and usages of the meeting, of which he knew or should have known. *Kay* at 943.

But that did not fully resolve the overbreadth issue, for there was still the issue whether the law can punish someone who is exercising First Amendment rights for violating unwritten customs – "implicit" customs, as the

Kay court characterized them, *Kay* at 943, 946 – by saying he *should* have known about them. Many people – certainly newcomers – are simply unfamiliar with even the written rules of a particular meeting.

There were other practical considerations as well. The *Kay* court recognized that "[m]eeting rules are seldom carefully spelled out or well known to the audience," and other rules and "tacit understandings" are "cloaked in obscurity and uncertainty." *Kay* at 945, n. 12. Even if the rules are clear, said the court, meeting officials will "commonly suspend or simply ignore such rules to expedite the work of the meeting." *Ibid.* In addition, silence of meeting officials in the face of unusual activity "necessarily suggests" that the activity is permitted, or at least that officials do not intend to enforce prohibitary rules to the contrary. *Ibid.*

To meet these very practical uncertainties, the court construed the statute to include a notice requirement. Before a person can be arrested for disturbing a public meeting by violating "implicit customs or usages" of the meeting, *Kay* at 943, meeting officials must let the person *know* he is in violation of the rules. At page 945 of the *Kay* decision, the California Supreme Court put it this way:

> Generally, if disturbances are occasioned by nonviolent exercise of free expression, section 403 will require that defendants be shown to have engaged in such conduct with knowledge, or under circumstances in which they should have known, that they were violating an applicable custom, usage or rule of the meeting. In instances in which the appropriate standard of conduct lies in doubt, a warning and a request that defendants curtail their conduct, either by officials or law enforcement agents, should

precede arrest or citation." *Kay* at 945 [Footnotes omitted].

Following the *Kay* decision, persons exercising their right to speak up at public meetings always knew where the line was drawn between protected free speech and unprotected criminal activity, because the chair of the meeting had to first explicitly draw such a line and tell the speaker where the line had been drawn. Speakers might dispute exactly where the line should be drawn, but they could safely speak out, even provocatively, with the knowledge that they could not be arrested unless and until a line was actually drawn.

C.

The Decision of the California Court of Appeal Now Permits an Arrest of the Speaker in a Public Forum if the Court Determines That It Was "Self-Evident" That His Conduct Was Not Protected by the First Amendment.

Now that has all changed. Now, says the California Court of Appeal, a speaker in a public forum – even the recognized speaker to whom the chair has granted the floor – can be arrested even if no line is drawn. Now the speaker can be arrested if it is, or should be, "self-evident" where the line *would* have been drawn. App. 14.

No longer does silence by meeting officials in the face of unusual or raucous activity imply that the activity is permitted, as the *Kay* decision had said. *Kay* at 945, n. 12. When McMahon announced his intentions to empty the trash out onto the tarp, the chair remained silent; the only response was from a member of the audience, who said, "Well, I hope you're prepared to clean it up." App. 3. But acquiescence no longer really means acquiescence.

Now the speaker must assume that a line will *always* be drawn, and he must also calculate accurately exactly where this imaginary line will be drawn. To be sure he is safe from arrest, he must divine not only where *he* thinks the line should be located, but where he thinks the chair of the meeting would draw it, and where a judge or jury, who did not even attend the meeting, will say, months or years later, where the line should have been drawn.

Indeed, our speaker may now not even rely on an *explicit* meeting rule which requires an express warning that the speaker is out of order. Board President Riffer testified that Board meetings were governed according to *Robert's Rules of Order*. (RT 823.) A perusal of *Robert's* reveals a section ["Guidelines for Chairs"] which sets out specific procedures to be employed when the chair believes a speaker is out of order. *21st Century Robert's Rules of Order*, Philip Lief Group, Inc., 1995 [Exhibit 15 at trial], p. 190-191. The chair should give a warning, such as, "The member is out of order." *Robert's*, *supra*, at 190. If after several attempts a member of the meeting will still not behave in an appropriate manner, the chair can "name" the member, and the chair "explains the offense to the member." *Id.*, at 193. If the member still does not curtail his conduct, he may be asked to leave the meeting. *Ibid.* Only if the member refuses all attempts and admonitions by the chair should the chair consider asking the police to "escort" the member from the meeting. *Ibid.*

The Court of Appeal's decision means that now a speaker, in addition to figuring out what others think is appropriate conduct, must also be able to discern when an unwritten rule trumps an explicit rule.

How can a speaker make sense out of this? How does a speaker know what actions are permitted by the First Amendment? Under such circumstances, can it seriously be denied that people who wish to voice their concerns to their elected representatives in a public forum will forego not only illegal activity, but protected speech as well, in order to be sure they do not step too close to an imaginary line that a judge might draw years after the fact? Is not *some* warning to a recognized speaker necessary, whether or not it is the exact warning described in *Kay*?

Imagine the effect this new standard will have. Imagine the power it gives to meeting officials to cut off unpopular debate – a speaker with an unpopular point of view can simply be arrested, without further warning, and physically removed from the forum.

Imagine the effect on potential speakers. Now in order to protect against a possible miscalculation of how others will view his conduct, the speaker must factor in an off-limits buffer zone which includes *protected* conduct, just to be sure he has taken into account the wide range of sensibilities of any person who might later hear his case.

D.

The California Court of Appeal Has Substituted A Vague Community Standard in Place of an Objective Standard Against Which Public Speakers Can Measure Their Conduct.

The Court of Appeal has effectively substituted some vague community standard for the objective tests that have previously been required by the courts to ensure adequate "breathing room" for the First Amendment.

But such a "community standard" will vary with the community, and even from person to person in the community. For example, the Court of Appeal thought it was obvious that dumping out the trash constituted a crime. But responding police officers, who saw the same trash, told Superintendent Hudson that McMahon was *not* committing a crime in their presence, and for that reason they could not arrest him. (RT 249.) Even Board Member McManus, the person who directed Hudson to call the police in the first place, testified that he did not think Mr. McMahon had committed a crime. (RT 958.)

Is the conclusion of an appellate court, who was not even present at the meeting, more valid than the persons who were actually there? If so, why?

These diverging opinions as to the legality of McMahon's actions show the folly of abandoning an objective, bright line test such as the one adopted in the *Kay* case. A meeting rule based on community standards which depend on how sensitive a person may be, will not work. The First Amendment is too important to allow it to change, chameleon-like, depending on the community and indeed the individual meeting.

E.

A Request to a Third Party to Call the Police Is No Substitute for a Warning and Request to the Speaker to Curtail His Conduct.

The Court of Appeal based its decision primarily on its assessment that it was self-evident that it was a criminal offense to dump out trash on a meeting room floor that would be used by children the next day. App. 14.

The court's opinion suggests, in the alternative, that even if the First Amendment *does* require that an arrest be proceeded by notice to the speaker that he is in serious violation of the rules of the meeting, then the evidence at trial showed that a warning *had* been given. More specifically, the court said that Board Member McManus' statement to Superintendent Hudson, made within earshot of McMahon, saying that Mr. McMahon's conduct was "absolutely inappropriate," and directing Mr. Hudson to call the police, "adequately gave McMahon the notice contemplated in *Kay*" that he was out of order and subject to arrest. App. 15.

Yet not a single defendant contended that McMahon had been requested to refrain from his activity. Anyone who was specifically asked, agreed that no such request had been made. For example, Alan Riffer, President of the School Board and chairman of the meeting, was questioned whether anyone asked Mr. McMahon not do dump garbage on the floor. He responded, "No. Mr. McManus made a statement, not a request." (RT 826.)

The need for certainty is manifest from the conflicting conclusions of the meeting chairman and the Court of Appeal. A person exercising his First Amendment rights should not be held to a higher standard than the chairman of the meeting itself. Nor should he be required to bet on whether the judge who decides his case will be more sensitive than Mr. Riffer.

It is clear that the reason why the *Kay* court required a warning before an arrest could be made pursuant to Penal Code § 403 when First Amendment rights were implicated was to eliminate any uncertainty as to whether meeting officials consider the speaker's conduct worthy of an arrest. Now it is immaterial that at least some reasonable

persons would not have interpreted Board Member McManus' comment as a warning and request. Now the speaker in a public forum must restrict his conduct to that which is unquestionably safe in the eyes of *every* person who may evaluate his conduct, and thereby steer far wider of the unlawful zone than the First Amendment requires. Long ago this court stated, "Free speech may not be so inhibited." *Baggett v. Bullett*, 377 U.S. 360, 372 (1964).

F.

The California Court of Appeal's Decision Makes the California Statute Unconstitutionally Vague Under the Fourteenth Amendment.

The California appellate court's decision makes flexible the interpretation of the limits of the First Amendment, and allows government agencies, judges and juries to enforce the criminal law based upon their personal predilections. A law which permits such enforcement is unconstitutionally vague under the Fourteenth Amendment. *Kolender v. Lawson*, 461 U.S. 352, 358, 361 (1983). The law should give the world a warning of what the law intends to do if a certain line is passed, and to make the warning fair, the line should be clear. *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

A vague statute is even more dangerous when the First Amendment is involved. The damage to First Amendment protections is "quite costly when the vagueness of a statute may inhibit the exercise of First Amendment freedoms." *Baggett v. Bullett*, *supra*, 377 U.S. at 379; see also *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

McMahon's non-verbal conduct was sufficiently "expressive" for First Amendment protection because he intended "to convey a particularized message" where the

likelihood was great that the message will be understood by those who heard it.[5] *Spence v. Washington*, 418 U.S. 405, 410-411 (1974).

II.

THERE WAS NO CLEAR AND PRESENT DANGER WHICH WOULD DISPENSE WITH THE REQUIREMENT THAT THE CHAIR ISSUE A WARNING AND A REQUEST TO THE SPEAKER. NOR WAS ANY OTHER IMPORTANT STATE INTEREST AT STAKE.

The California Court of Appeal thought the illegality of McMahon's actions were so obvious that the court's opinion does not spell out exactly why dumping trash onto a tarp placed on a schoolroom floor should be a "self-evident" violation of the law. There is nothing in the Court of Appeal's opinion saying that the trash contained anything remotely hazardous, even if some of the trash did spill off onto the floor, and even if it was in a room "where children eat lunch" the next day. App. 14. The record itself shows that the specific testimony of the witnesses all described only innocuous waste, mostly paper. They described it as "papers, perhaps bottles" (RT 941); "wadded up pieces of paper" (RT 750); "[b]ottles, paper cups, trash" (RT 198, 218); "a piece of brown paper, like brown bag . . . a Styrofoam cup and then maybe there was a bottle." (RT 181.) No one described any animal or vegetable matter, or

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[5] It is likely that McMahon's message *did* get across to at least one member of the Board. Immediately after the Superintendent was directed to call the police and the motion to adjourn was made, Board Member Skinner said, "I think the point's been made." (CT 272.)

hazardous materials. To the contrary, all persons who were asked the question specifically disclaimed any hazardous content in the trash. For example, Craig Boylan, the school principle, testified, "I didn't see any specific material that I thought was dangerous." (RT 942.)

Whatever fears the appellate court had for children using the room the next day, the Board does not seem to have shared them. The record shows that after the police took Mr. McMahon away, Superintendent Hudson and others simply picked up the tarp and the trash and put it in a receptacle at the back of the room. (RT 942.) This is not surprising, for the children were likely to be harmed more by whatever was tracked in on the shoes of the audience than they were from a paper cup or an empty bottle which may have fallen off the tarp.

Nor did the Court of Appeal weigh any potential dangers against the means necessary to eliminate such a danger. The court focused on a statement in *Kay* that a request and warning should be given when the "appropriate standard of conduct lies in doubt," and reasoned from that language that a warning is not necessary in every case. App. 14.

That conclusion is undoubtedly true, but only in rare cases. The only exception we can think of is when a danger to public safety is created. One cannot yell fire in a crowded meeting. See *Schenck v. United States*, 249 U.S. 47 (1919). But such conduct falls within another, different rule of law which protects against arbitrary arrests – the requirement of a "clear and present danger" before a person exercising First Amendment rights can be arrested.

The Court of Appeal soundly rejected McMahon's contention that he was entitled to a jury instruction that

in order for the defendants to justify the arrest on the basis that McMahon's conduct created a danger to anyone, "that the justification must include proof of not only a danger, but a clear and present, i.e., immediate, danger." App. 18. The court reasoned that although the clear and present danger had been applied to other California criminal statutes, it had never been applied to Penal Code § 403. "McMahon was arrested for a violation of Penal Code section 403, not 415 [the disorderly conduct statute].[6] Nothing in section 403 or in the Supreme Court's opinion in *Kay* imposes a clear and present danger requirement." App. 13. The court then makes the cryptic statement that the "danger and safety issues" were considered only in deciding whether McMahon's conduct violated the customs and usages of the meeting "held in a schoolroom where young children are cared for." App. 13-14; see also App. 18, n. 3.

But even if the "danger issues" were considered in the context of meeting rules, does not the First Amendment require that only clear and present dangers be considered? A governmental agency cannot eliminate the protections of the First Amendment, for example, by adopting a "meeting rule" that prohibits protected speech from creating a *possible* danger, or a danger at some *future* time. The First Amendment outweighs governmental interests in unspecified potential dangers at some time in the future.

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[6] One of the cases cited by the court, *In re Brown*, 9 Cal.3d 612, 623, 510 P.2d 1017 (1973) also applied the clear and present danger to California's unlawful assembly statutes (Pen. Code § 407, § 408).

Not a single witness at the trial voiced any specific concern over the safety of the school children who would use the room the next day. The only concern was the one voiced by the California appellate court, which was a vague undifferentiated fear for the children who ate lunch there. "But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 508 (1969)

This court has recognized that freedom of speech, including expressive conduct, is protected against punishment unless "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963).

In more recent cases this court has taken a somewhat different approach. In *United States v. O'Brien*, 391 U.S. 367 (1968) the court promulgated a four-pronged test, to determine whether a law unduly infringes on the First Amendment. To be valid, (1) the law must be within the constitutional power of the government; (2) the law must further an important governmental interest; (3) the governmental interest must be unrelated to the suppression of free expression; and (4) the restriction can be "no greater than is essential to the furtherance of that interest." *Id.* at 377. In a later decision, this court stated that restrictions on speech will be upheld only if narrowly

drawn to accomplish a "compelling" governmental interest.[7] *United States v. Grace*, 461 U.S. 171, 177 (1983).

The facts of the case at bar clearly do not meet factors (2) and (4) of the *O'Brien* test. There was no evidence that the trash was hazardous, and the possibility that "other speakers would have had to stand near the trash" and that audience members would have been forced to "peer over a mound of garbage in order to watch a public body perform its duty," App. 17, we submit, are not *important* governmental interests.

California law requires public agencies to devote part of every meeting to comments by the public. Calif. Govt. Code § 54954.3(a). Mr. McMahon was not an interloper who walked into the meeting and dumped out trash onto the floor, as the Court of Appeal treated him. App. 13. In fact he was the recognized speaker whom the chair had granted permission to speak, and who was using the trash to illustrate a problem he was trying to get the Board to resolve. The state's primary interest, at the moment McMahon was speaking, was that he be permitted to present his views to the Board. Indeed, the California Government Code required it. Mr. McMahon's display of the trash did not impair the conduct of the meeting; it was a legitimate element of it.

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[7] These pronouncements by this court are consistent with the California Supreme Court's decision in *In re Kay*, *supra*, 1 Cal.3d 930 where the court said that restrictions on First Amendment rights "must be drawn with a narrow specificity calculated to prevent repression of expressive activities as to which restriction is constitutionally forbidden" (*Kay* at 941), and that Penal Code Section 403 can be used only to promote "an *important* state interest." (*Kay* at 944 [italics in original].)

Nor was the arrest of McMahon the least restrictive means to correct whatever government interest the Board thought it was protecting. A simple request to Mr. McMahon to conclude his remarks and pick up his trash would have resolved whatever problem the Board thought existed, in far less time than it took to arrest Mr. McMahon.

None of the other facts justify resort to an arrest. McMahon could not be arrested for continuing to talk to the audience after the meeting was adjourned, nor for failing to pick up the trash "[e]ven after the police arrived." App. 15. Even if one were to conclude that a meeting was still going on after the adjournment, only "lawful" meetings are protected by Penal Code § 403. Once a meeting of a public agency is adjourned, it cannot be recommenced before its next scheduled meeting unless proper statutory notices are given of a special meeting. Calif. Govt. Code § 54955. After the meeting was adjourned, there was no "lawful meeting" to disrupt.

III.

THE RIGHT TO SPEAK FREELY IN A PUBLIC FORUM IS A FUNDAMENTAL RIGHT. THE COURT OF APPEAL'S OPINION ALLOWS GOVERNMENTAL BODIES TO EASILY ELIMINATE FIRST AMENDMENT PROTECTIONS.

The danger of giving meeting officials such broad power to arrest a speaker in a public forum cannot be overemphasized. It allows government agencies to cut off unpopular debate with no practical remedy to a speaker. It allows government agencies to refuse to respond to the pleas of it's citizens.

Mr. McMahon's case is illustrative of what the Court of Appeal's ruling can do.

McMahon's concerns had been presented to the Board before, both through his statements at Board meetings and in the form of a petition he had circulated in his neighborhood and which he sought to present to the Board the night he was arrested. The petition detailed McMahon's concerns that the Board had avoided filing a full environmental impact statement when the Board proposed the new middle school. He presented his petition a total of three times, but each time it was suppressed by the School Board. McMahon sought to prove at his trial that his arrest was nothing more than another attempt to suppress his legitimate concerns. The appellate court's decision has thwarted his efforts.

Moreover, the entire process in the proceedings before the School Board and throughout the court proceedings disregarded the presumption of innocence. The law gives to a person arrested without a warrant a presumption of innocence in a civil lawsuit just like the presumption afforded a criminal defendant. The proceedings in the case at bar, culminating in the decision of the Court of Appeal, deprived McMahon of this presumption of innocence. The law should presume that the speaker in a public forum is acting within the law. The decision of the Court of Appeal has shifted the burden to the speaker, and now all speakers must take the safe course, instead of the course favored by the principles of free speech.

The expression of one's views on matters of public concern also takes on political overtones. The matters raised by McMahon at the Board meeting and the Board's efforts to suppress his concerns tend to show that what

was interrupted was not mere speech, but political speech. Political process should tend toward truth. The Board's reaction by having McMahon arrested are evidence of a political pathology that has supplanted the reasoned debate envisioned by the Framers of the Constitution.

CONCLUSION

There are thousands of state and local boards, agencies and commissions in California. Under California's Open Meeting Law, every one of those government agencies is required to allocate a certain portion of their agenda to allow comment by the public on matters of public concern. Calif. Government Code § 54954.3(a). Every person who steps up to the microphone at one of those meetings, every day, every month, every year hereafter, will be affected by the Court of Appeal's decision in this case. Every one of those speakers will be subject to arrest – without warning – if the discussion becomes heated and one of the meeting officials turns to another official and says, "Call the police! This is an inappropriate activity!"

Is this *good* for America? Can a statute which requires such prescience on the speaker's part – under pain of arrest – be allowed to govern the actions of speakers in a public forum?

David McMahon waited his turn to address the local School Board about his concerns about matters over which the Board had jurisdiction. His display of trash generated by the students was "evidence" in support of his "testimony" about conditions he sought to correct. The Board's response was to terminate the meeting and arrest Mr. McMahon.

It is eminently reasonable to require that a speaker in a public forum does not have to guess when meeting officials consider him subject to arrest. Such a rule comports with generally accepted meeting rules, as exemplified by guides such as *Robert's Rules of Order*. It honors the requirement of the California Penal Code that any disruption of a public meeting be willful. See *People v. Malone*, 156 App. Div. 10, 141 N.Y.S. 149, 152 (1913) [speaker did not violate similar New York statute until the chairman of the meeting asked the speaker to cease her conduct and warned her to sit down]. And it protects free speech in a public forum.

A school board meeting at which the public are permitted to express their ideas is *per se* a public forum. *Madison School District v. Wisconsin Emp. Rel. Comm'n*, 429 U.S. 167, 178-179 (1976) (Brennan, J., concurring).

Protections of the First Amendment are not dependent on a particular audience's reaction, *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) nor does the law permit a public board to determine what is included within the term "acceptable conduct" in the exercise of free speech. Such would be nothing less than a prohibited "roving commission," empowering public officials to dispense or withhold permission to speak according to their own opinions regarding the potential effect of the activity in question. *Interstate Circuit v. Dallas*, 390 U.S. 676, 688 (1968); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 153 (1969).

"A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly 'of the people and by the people.'" *Board of Education v. Pico*, 457 U.S. 853, 891 (1982) (Burger, C. J., dissenting). This decision gives governmental agencies carte blanche to hear or not

to hear speakers, to arrest whom they, in their sole discretion, deem to be engaging in "inappropriate" conduct, with no announced standards to guide them or the speakers. Now the government has, according to the California Court of Appeal, been given the power to arrest without warning. Concerned citizens who do not wish to risk arrest are sentenced to silence, or, at best, tepid voices of approval of whatever actions the governmental body might take. No court has ever before permitted such governmental control over speech in a public forum.

What is a "self-evident" violation of the law is still a mystery. The speaker in a public forum has no clearly defined standard by which to gauge his conduct, and judges and juries, who must evaluate what was "self-evident" months or years later, have no standard to guide them.

Is this good First Amendment law? It affects thousands of persons. This court should grant the petition, examine the issues, and decide the question.

Respectfully submitted,

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DAVID McMAHON, Plaintiff and Appellant, v. ALBANY UNIFIED SCHOOL DISTRICT, et al., Defendants and Respondents.	A093980 (Alameda County Super. Ct. No. 7846719)

Here we hold that appellant David McMahon's motion for directed verdict was appropriately denied and that the jury properly rejected his false arrest claim. His conduct of dumping gallons of garbage on the floor of a schoolroom during a school board meeting was sufficient to support an arrest for disturbing a public meeting and was not speech protected by the First Amendment. We reject McMahon's other claims of error as well and affirm the judgment.

Factual and Procedural Background

The events at issue here occurred at the April 1996 meeting of the board of the Albany Unified School District (the District), attended by the five board members and School Superintendent Dale Hudson. Between January and April 1996, the board held its meetings in the multi-purpose room of Cornell Elementary School. Meetings included time during which members of the public could

speak to the board. Speakers used a microphone located in front of the board members and Hudson, who sat at tables facing the audience.

Before the meeting in question, McMahon had attended several other board meetings at Cornell Elementary School. At two of those meetings he spoke about trash left by Albany High School students in the neighborhood around the campus. McMahon began picking up litter in the area. He brought a bag of this rubbish to the board meeting in February 1996, and lifted it in the air as he discussed the trash problem. McMahon told the board that the bag contained drug paraphernalia and alcohol containers. He did not empty the bag. No board member prevented McMahon from speaking at the February board meeting or any other meeting.

About 15 people were in the audience of the April board meeting. McMahon brought five 13-gallon bags of trash and placed them in the back of the room before the meeting began. He had been collecting the garbage over several weeks. During the public comment period, McMahon addressed the board. He spoke about seismic retrofitting and traffic improvements related to the building of a new middle school. McMahon then told the board he wanted to discuss trash. He said, "Excuse me one moment while I bring up some trash."[1] He went to the back of the room and retrieved two or three bags, gloves and a plastic

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[1] The meeting was tape-recorded. A copy of the tape, played for the jury, was admitted in evidence. A copy of the transcript was provided to assist the jury in listening to the tape, and was included in the record on appeal. (Cal. Rules of Court, rule 203.5.) We have listened to the tape and reviewed the transcript.

tarp. As McMahon opened the tarp, board president Alan Riffer asked, "What is your intent, because this period is matters to address the Board, and we need to have some limit on – and so that we can move on to the rest of the agenda." McMahon replied, "My intent is to talk about public safety as related to trash. And to underscore my point. . . . " McMahon then spread the tarp on the floor and untied the bags. Craig Boyan, principal of Cornell school, was seated in the front row of the audience. Rising from his chair, Boyan called out to McMahon, "Excuse me, kids are in this room tomorrow, and I hope you're not planning on emptying trash out here on the floor." McMahon replied, "I certainly am," to which Boyan responded, "Well I hope you're prepared to clean it up." The multipurpose room was used as the school's cafeteria and student assembly room and for an after-school childcare program. Meals for Cornell and other elementary schools were cooked in the kitchen adjacent to the multipurpose room.

McMahon, wearing gloves, lifted a bag and dumped its contents on the tarp. Although McMahon was uncertain how many bags he emptied, an audience member saw him dump two bags of garbage. Because McMahon had not fully spread the tarp, some of the trash spilled onto the floor. Principal Boyan described the amount dumped as "substantial," "enough to fill up the tarp."

By this time, superintendent Hudson was standing. Board member McManus said to Hudson, "[W]ill you call the police, because this is an absolutely inappropriate activity to do . . . in a schoolroom. . . . " McMahon responded, "Get the police here because there are some things that I would like the police to see in this trash." The meeting was then adjourned and the board left the room. McMahon announced, "There are drug paraphernalia in

this trash, there are bottles of alcohol in this trash." Although McMahon claims the board was gone when he described the contents of the bags, one board member heard the remark as she was leaving the room. The board remained in the adjoining kitchen while McMahon continued emptying trash and speaking to the audience. Hudson called the police.

McMahon was still talking to the audience when the police arrived. Hudson explained that the board wanted McMahon removed so that the meeting could continue, but that McMahon was "still at the microphone" and "[h]e dumped some trash." A police sergeant testified that Hudson wanted McMahon arrested. The sergeant advised Hudson that the police did not have the authority to arrest McMahon because the accusation did not involve a felony and no misdemeanor has been committed in police presence. Hudson then made a citizen's arrest of McMahon for willfully disturbing a public meeting. McMahon continued talking to the audience as officers approached him, placed him in handcuffs and took him to the police station. The board meeting resumed. McMahon was issued a citation and released. No criminal charges were filed against him.

McMahon sued the District, its board members and superintendent Hudson, alleging various causes of action. At trial, as a result of pretrial rulings, the only remaining cause of action accused the District, Hudson and McManus of false arrest and false imprisonment.[2] A nonsuit was

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[2] "[W]e point out that 'false arrest' and 'false imprisonment' are not separate torts. False arrest is but one way of committing a false imprisonment, and they are distinguishable only in terminology.

(Continued on following page)

granted as to McManus. The jury was unable to [ ] reach a verdict on the District and Hudson. After a second trial, the jury returned a special verdict in favor of the remaining defendants.

I. *The Court Properly Denied the Motion for a Directed Verdict*

McMahon contends the trial court erred in denying his motion for a directed verdict. His claim is without merit.

"A directed verdict may be granted only when, disregarding conflicting evidence, giving the evidence of the party against whom the motion is directed all the value to which it is legally entitled, and indulging every legitimate inference from such evidence in favor of that party, the court nonetheless determines there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of that party." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629-630.)

If a party resisting a motion for a directed verdict produces sufficient evidence to support a jury verdict in its favor, the motion must be denied. (*Howard v. Owens Corning, supra,* 72 Cal.App.4th at p. 630.) McMahon's challenge essentially contends that insufficient evidence supports the jury verdict against him. "Only if there was *no* substantial evidence in support of the verdict could it

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[Citations.]" (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 673.)

have been error for the trial court earlier to have denied [the] motion for directed verdict." (*Ibid.*)

In determining whether the judgment was supported by substantial evidence, we consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in favor of the judgment. We do not reweigh the evidence. "Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment." (*Howard v. Owens Corning, supra,* 72 Cal.App.4th at pp. 630-631.)

"A private person may make a 'citizen's arrest' for a public offense committed in his presence. (P.C. 837(1).) However, the cooperation of police officers is necessary to make the arrest effective. The citizen calls the police; they are unable to make an arrest because the offense was previously committed outside their presence; but the citizen may make the arrest and the officers will then take the arrested person into custody." (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 390, p. 473, italics omitted.) The jury was instructed that respondents bore the burden of proving that McMahon was lawfully arrested. It found the burden had been met. Substantial evidence supports the finding and therefore the court did not err in denying McMahon's motion for a directed verdict.

A. *The Supreme Court's Decision in In re Kay*

McMahon was arrested for violating Penal Code section 403, which provides in part: "Every person who, without authority of law, willfully disturbs or breaks up any assembly or meeting that is not unlawful in its

character, . . . , is guilty of a misdemeanor." The California Supreme Court undertook an extensive analysis of section 403 in *In re Kay* (1970) 1 Cal.3d 930 (*Kay*), interpreting the provision to withstand a First Amendment challenge. In *Kay,* over 6000 people attended a Fourth of July celebration in a public park. A local congressman was invited to speak during the formal program that preceded the fireworks display. During the congressman's speech, a group of 25 to 250 persons rhythmically clapped and shouted for 5 to 10 minutes, demonstrating disapproval of the congressman's position on a grape boycott. The congressman, who had been using a microphone, was able to finish his speech, pausing to assure the demonstrators that they had a right to protest and encouraging them to be grateful that they lived in a country that protected that right. Neither the congressman nor the police asked the protestors to stop or disperse. When the speech and the program ended, the fireworks were shown. The demonstration did not affect the program. Charges were filed against the protestors two weeks later. (*Id.* at pp. 935-936.)

The *Kay* court noted that, with a single, irrelevant exception, section 403 had not been interpreted since its passage almost a century earlier. It then considered the constitutionally permissible bounds of such a statute. The court pointed out that it was guided by principles affecting First Amendment rights and that the conduct involved in *Kay,* including the clapping, constituted "speech" for the purposes of its analysis. (*Kay, supra,* 1 Cal.3d at p. 938.)

Justice Tobriner, writing for the majority, observed: "The Constitution does not require that any person, however lofty his motives, be permitted to obstruct the convention or continuation of a meeting without regard to

the implicit customs and usage or explicit rules governing its conduct." (*Kay, supra,* 1 Cal.3d at p. 938.) The rights of some to peaceably assemble and petition for redress of grievances would be undermined if others could prevent or disrupt such activities by disregarding the customs and rules which apply to meetings at which those rights are exercised. On the other hand, other First Amendment rights are at stake when views are publicly expressed. The *Kay* court sought to strike the constitutionally required balance.

"Audience activities, such as heckling, interrupting, harsh questioning, and booing, even though they may be impolite and discourteous, can nonetheless advance the goals of the First Amendment. For many citizens such participation in public meetings, whether supportive or critical of the speaker, may constitute the only manner in which they can express their views to a large number of people; the Constitution does not require that the effective expression of ideas be restricted to rigid and predetermined patterns." (*Kay, supra,* 1 Cal.3d at p. 939.)

However, "the Constitution indubitably affords some measure of protection to the free expression of *all* those present at a meeting," including speakers, officials and the audience. (*Kay, supra,* 1 Cal.3d at p. 941 italics added.) Because of this broad-ranging protection, "section 403's prohibition of 'disturbances' potentially may collide with safeguarded First Amendment interests. Nonetheless, the state retains a legitimate concern in ensuring that some individuals' unruly assertion of their rights of free expression does not imperil other citizens' rights of free association and discussion. [Citation.] Freedom of everyone to talk at once can destroy the right of anyone effectively to

talk at all. Free expression can expire as tragically in the tumult of license as in the silence of censorship." (*Ibid.*)

The *Kay* majority concluded that section 403, as written, was constitutionally infirm because it applied to "every person who . . . willfully disturbs or breaks up any assembly or meeting. . . . " If invoked without restriction, the statute could criminalize conduct that was "nothing more than an expression of free speech protected by the Constitution." (*Kay, supra,* 1 Cal.3d at p. 941.) The court then interpreted section 403 in a way to serve its purpose without constitutional impingement: "Accordingly, we now explicitly recognize that, in light of the purposes of the provision and the competing First Amendment interests at stake, section 403 authorizes the imposition of criminal sanctions only when the defendant's activity itself – and *not* the content of the activity's expression – substantially impairs the effective conduct of a meeting. [¶] To effectuate section 403 within constitutional limits we interpret it to require the following showing to establish its transgression: that the defendant substantially impaired the conduct of the meeting by intentionally committing acts in violation of implicit customs or usages or of explicit rules for governance of the meeting, of which he knew, or as a reasonable man should have known." (*Id.* at pp. 942-943.)

The *Kay* court made clear that, in applying its ruling, the nature of the meeting in question "plays a major role." "The customs and usages at political conventions may countenance prolonged, raucous, boisterous demonstrations as an accepted element of the meeting process; similar behavior would violate the customs and usages of a church service. Audience participation may be enthusiastically welcomed at a bonfire football rally or an athletic contest, but considered taboo at a solemn ceremony of a

fraternal order. . . . Thus, rather than enacting monolithic standards, section 403 draws its content from the implicit customs and usages or explicit rules germane to a given meeting." (*Kay, supra,* 1 Cal.3d at p. 943.)

Kay involved the criminal prosecution of defendants who expressed views contrary to those voiced by an elected official at a large outdoor event. Since *Kay's* publication, no appellate opinion has considered a section 403 violation. Here we must apply *Kay's* rationale to the prosecution of a civil lawsuit for false arrest in which McMahon claims he was improperly arrested by public officials whom he was addressing at a small meeting conducted in a schoolroom.

B. *Trial Court's Application of Kay*

The jury in this case was instructed in language specifically based on the authority of *Kay.* It was told: "A fundamental right under the First Amendment of our United States Constitution is freedom of speech. Freedom of speech includes expression which is not only spoken but may include acts or conduct. When conduct is intended to express a message and the likelihood is great that the message would be understood by those who view it, it is entitled to the same protection under the Constitution as the spoken word. [¶] In determining whether Mr. McMahon's acts and conduct violated the law to warrant his arrest as a violation of Penal Code section 403, a distinction has to be drawn between expression which may include acts and an act independent of expression. An act may coexist with expression as well as being a part of the expression which is protected by the First Amendment. [¶] Consequently, Penal Code section 403 authorizes an arrest

by citizens or police officers only when a person's (for purposes of this trial Mr. McMahon's) activity itself – and *not the content* of the activity's expression – substantially impairs the effective conduct of the meeting. [¶] For a violation of Penal Code section 403, *disturbing a lawful assembly,* the following elements must exist: [¶] 1. Mr. McMahon must have substantially impaired the conduct of the meeting; [¶] 2. by intentionally committing acts; [¶] 3. in violation of implicit customs or usages for the governance of the meeting of which he knew or, as a reasonable person should have known. [¶] If you find by a preponderance of the evidence that such facts are true, you must find that there was proper cause to arrest Mr. McMahon. [¶] If you find that such facts are not true, you must find that there was not proper cause to arrest Mr. McMahon. That is, if you find that Mr. McMahon was arrested because of his expression (speech) – which can include activities – and not because of his conduct alone, then he would not have been properly arrested. [¶] If you find that the standard of conduct for the Board of Education meeting lies in doubt, in determining whether Mr. McMahon violated implicit customs or usages for the governance of the meeting, a warning and request that Mr. McMahon curtail his conduct should proceed [*sic*] an arrest. You may consider whether or not a warning or request was directed to Mr. McMahon to cease his activities, and if none, whether there was an opportunity for such a request to be directed to him. If you find that no warning was given and there was an opportunity to give such a request than [*sic*] the arrest is unlawful. [¶] In the crime of *disturbing a lawful assembly* there must exist a union or joint operation of act or conduct and general criminal intent. General criminal intent does not require an intent to violate the law. When a person intentionally does that which the law

declares to be a crime he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful."

The jury was thus told of the necessity to distinguish between disruptive acts and the protected content of an act's expression. It was informed of the elements required for a violation of section 403 in conformity with *Kay*.

C. *Violation of the Customs of the Meeting*

1. *The Act of Dumping Trash*

McMahon claims that no custom or usage, of which he knew or should have known, prevented him from dumping gallons of garbage onto the schoolroom floor. Sufficient evidence supports the jury's finding to the contrary.

The record indicates that McMahon freely discussed a range of subjects at the school board meetings, including trash in school neighborhoods. Previously he had illustrated his point by holding up a bag of discarded items he had collected. None of this conduct was unacceptable within the context of meetings held in Cornell Elementary School's multipurpose room. The jury concluded, however, that dumping trash on the tarp and floor was another matter. The room served as the school's cafeteria and student assembly room, and was used after school for childcare. When McMahon started emptying the bag, Principal Boyan expressly cautioned him: "Kids are in this room tomorrow. . . . " The jury reasonably concluded that dumping trash is not an accepted element of meetings regularly held in a room where children eat and congregate, and thus violated the customs and usages of those meetings. Although McMahon told the audience that the

bags contained drug paraphernalia and bottles of alcohol, he now describes the contents as innocuous. His assertion is irrelevant. McMahon dumped garbage. It was well within the jury's province to conclude that McMahon's conduct exceeded the bounds of constitutionally protected speech and crossed the line into the "tumult of license." (*Kay, supra,* 1 Cal.3d at p. 941.)

2. *Clear and Present Danger*

McMahon contends that if the board considered that the material he dumped was dangerous or a threat to public safety, respondents had the burden of demonstrating that dumping the trash represented a "clear and present danger." He argues that the First Amendment does not permit the arrest of a speaker for a mere possible danger or for a danger that may occur at some future time. In support of this proposition, McMahon relies on *In re Bushman* (1970) 1 Cal.3d 767, *In re Brown* (1973) 9 Cal.3d 612 and *Jefferson v. Superior Court* (1975) 51 Cal.App.3d 721 all cases that considered violations of Penal Code section 415. As noted by the *Bushman* court, the portion of section 415 applicable in those cases "makes punishable only wilful and malicious conduct that is violent and endangers public safety and order or that creates a clear and present danger that others will engage in violence of that nature." (*In re Bushman, supra,* 1 Cal.3d at p. 773.) McMahon was arrested for a violation of Penal Code section 403, not 415. Nothing in section 403 or in the Supreme Court's opinion in *Kay* imposes a clear and present danger requirement. The danger and safety issues involved with dumping trash on the floor were considered only in the context of whether such activity violated the

customs and usages of a meeting held in schoolroom where young children are cared for.

3. *Need for a Warning*

McMahon also argues that the board should have warned him or asked him to stop before having him arrested. McMahon relies on the following language from *Kay*: "Generally, if disturbances are occasioned by nonviolent exercise of free expression, section 403 will require that defendants be shown to have engaged in such conduct with knowledge, or under circumstances in which they should have known, that they were violating an applicable custom, usage, or rule of the meeting. In instances in which the appropriate standard of conduct lies in doubt, a warning and a request that defendants curtail their conduct, either by officials or law enforcement agents, should precede arrest or citation. If section 403 were not so interpreted, individuals would be forced to speculate as to what conduct might entail criminal sanctions and would 'necessarily . . . "steer far wider of the unlawful zone."'" (*Kay, supra,* 1 Cal.3d at p. 945, citations and footnotes omitted.)

At the outset we note that *Kay* does not require a warning in every circumstance that portends a section 403 violation. The *Kay* court states that in instances where the "appropriate standard of conduct lies in doubt," a warning and request to curtail conduct should precede arrest or citation. The jury could reasonably have determined that it is self-evident that dumping garbage in a room where children eat lunch violates the custom or usage of the board meetings, obviating the need for a warning or request to stop. Nevertheless, even if admonishments were

required in these circumstances, there is sufficient evidence in the record indicating that McMahon was advised that his conduct was improper. Although McMahon claims he did not realize that Boyan was the principal of Cornell School, Boyan's comment nevertheless should have reminded McMahon of the obvious: children use the multipurpose room. Moments later, McMahon heard board member McManus state, "This is an inappropriate activity to do in a school room." McMahon also heard McManus tell Hudson to call the police. Still, McMahon made no effort to stop and pick up the trash. Instead he urged Hudson to call the police. McMahon continued to dump garbage and speak to the audience after the board left the room. Even after the police arrived, McMahon did not pick up the refuse.

McMahon contends that McManus's statement was insufficient under *Kay* to serve as a warning and request to desist. He contends that a board member should have stated expressly, "Mr. McMahon, you are out of order. Please pick up your trash and conclude your remarks." *Kay,* however, does not mandate the use of any particular talismanic phrase. Rather, sufficient notification should be given so that individuals are not "forced to speculate as to what conduct might entail criminal sanctions." (*Kay, supra,* 1 Cal.3d at p. 945.) Board member McManus's direct identification of the conduct as inappropriate and his request to have the police called adequately gave McMahon the notice contemplated in *Kay.* Instead, McMahon encouraged Hudson to call the police. On this record, McMahon's assertion that he was given neither warning nor time to curtail his conduct is unfounded.

D. *Substantial Impairment of the Meeting*

McMahon also argues that his conduct did not "substantially impair the conduct of the meeting." (*Kay, supra,* 1 Cal.3d at p. 943.) McMahon argues that the board could have continued the meeting, but simply chose not to do so. "Whether a given instance of misconduct substantially impairs the effective conduct of a meeting depends upon the actual impact of that misconduct on the course of the meeting; the question cannot be resolved merely by asking persons present at the meeting whether they were 'disturbed.' [Citation.]" (*Id.* at p. 944.) The *Kay* court, considering the Fourth of July celebration at issue before it, concluded that "[s]ince the nature of that meeting contemplated acceptance of the nonviolent expression of alternative viewpoints, the petitioners' protest did not impair the conduct of the meeting but instead constituted a legitimate element of it." (*Ibid.*)

Here, the jury, evaluating the impact of McMahon's conduct on the course of the meeting, concluded that McMahon did more than merely disturb the sensibilities of the board members. McMahon initially addressed the board about trash, eliciting no objections from the board about the content of that speech. He then left the microphone, returned with his garbage bags and spread a tarp on the floor. At that point, board president Riffer alerted him that the board needed to move onto other matters on the agenda. Nevertheless McMahon proceeded to dump the bags' contents.

The jury legitimately concluded that the board, forced to adhere to McMahon's agenda, was unable to proceed with its own. Had McMahon been permitted to continue dumping his trash in the middle of the meeting, one of two

outcomes would necessarily have transpired. Either the meeting would have been further delayed at some point while McMahon picked up the garbage or other speakers would have had to stand near the trash in order to address the board and audience members would have been forced to peer over a mound of garbage in order to watch a public body perform its duty. The properly instructed jury declined to provide "so excessive a use of the First Amendment right to protest that the right would be devoured in its own excesses." (*Kay, supra,* 1 Cal.3d at p. 946.) Substantial evidence supports the jury's finding that McMahon's conduct was not a legitimate element of the meeting, but rather a significant impairment of it. (*Id.* at p. 944.)

II. *The Court Did Not Err in Refusing McMahon's Requested Instruction*

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) Although the trial court fashioned a jury instruction based on *Kay,* set out in section IB above, McMahon proposed an alternate instruction. He argues that the court erred in failing to incorporate certain portions of his proposed language. His claim is without merit.

McMahon argues that the trial court should have included this sentence from his proposed instruction: "A person may not be arrested for offensive speech or expressive conduct unless there is both a clear and present danger of violence or threat to public safety." McMahon argues that the court's instruction did not inform the jury

"that when an arrest is sought to be justified on grounds that conduct which involves speech creates a danger to public safety, that the justification must include proof not just of a danger, but of a clear and present, i.e., immediate, danger." As we have discussed, McMahon was not arrested for disturbing the peace in violation of Penal Code section 415. McMahon's proposed language is not applicable to section 403 and the trial court properly rejected it.[3]

McMahon also claims that the jury should have been told: "Under the First Amendment it is lawful for a person to express himself through speech or expressive conduct even though that speech or conduct is not in accord with propriety, modesty, good taste or good manners. Likewise, a person may exercise his right of free speech even . . . when his audience finds his speech or conduct offensive." He also proposed an additional instruction on this topic which stated in part: "The subject matter of the communication protected by the Constitution is not limited by what the audience may prefer to hear. The Constitution may best serve its high purpose when it induces a condition of

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[3] In closing argument, respondents' counsel argued: "First Amendment of the U.S. Constitution does not allow you to call or yell out fire in a theater. It doesn't allow you to light a fire in a cafeteria room [or] public school where young kids are, and I don't think the First Amendment allows you to dump trash that you have previously described as drug paraphernalia in the cafeteria when you've been told there's going to be kids in there the next day, young kids." McMahon correctly observes that counsel's reference to yelling fire in a theater is taken from *Schenck v. United States* (1919) 249 U.S. 47, in which Justice Holmes first announced the "clear and present danger test." Counsel's remark did not inject the "clear and present danger" requirement into the jury's consideration, however. Considered in context, counsel's remark was intended to depict McMahon's actions as violating the customs of the board meeting and disrupting the proceedings.

unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."

The court's instruction was a correct statement of the law and adequately addressed the issues to be resolved by the jury. The fact that McMahon's conduct may have been offensive or beyond good taste or "inducing a condition of unrest" is not the inquiry under section Penal Code 403. The *Kay* court recognized the potential conflict between section 403's prohibition of "disturbances" and First Amendment interests. The court noted, "Nonetheless, the state retains a legitimate concern in ensuring that some individuals' unruly assertion of their rights of free expression does not imperil other citizens' rights of free association and discussion." (*Kay, supra,* 1 Cal.3d at p. 941.) The trial court's instruction correctly advised the jury to consider whether McMahon's conduct, apart from his message, violated the customs of the meeting and resulted in the "substantial impairment of the conduct of that meeting." (*Id.* at p. 945.) The jury was specifically told that if McMahon was arrested because of the content of his speech, the arrest was improper. This charge adequately covered the point made in the non-argumentative part of McMahon's proposed instruction.

Finally, McMahon contends that the trial court erred in not incorporating the following part of his proposed instruction: "In instances in which the appropriate standard of conduct lies in doubt, the chairman or other officials conducting the meeting must give a warning and a request that the speaker curtail his conduct." The trial court's instruction states in part: "You may consider whether or not a warning or request was given to Mr. McMahon." McMahon argues that the trial court should have instructed the jury that the warning or request must

come from meeting officials. He relies on the statement in *Kay* that "a warning and a request that defendants curtail their conduct, either by officials or law enforcement agents, should precede arrest or citation." (*Kay, supra,* 1 Cal.3d at p. 945.) McMahon claims the omission of his proposed language allowed jurors to find that the remarks of Principal Boyan, seated in the audience,[4] constituted a sufficient warning.

We need not become enmeshed in a debate over whether Principal Boyan was an "official" for purposes of the *Kay* standard. The obvious purpose of a warning is to clarify the appropriate standard of conduct, should that standard be in doubt. Even if we assume, solely for the purposes of argument, that a reasonable person might entertain an honest doubt about whether it violates implicit customs or usages of such a meeting to dump garbage on the floor of a school room, there was more than sufficient evidence to prove McMahon had such notice based on the statement of board member McManus.

III. *McMahon's Federal Civil Rights Claim Was Time Barred*

On October 30, 1996, McMahon filed a claim against the District under the California Government Claims Act (Gov. Code, § 910 et seq.) (Claims Act), alleging false arrest. The claim was denied on February 10, 1997. McMahon filed his original complaint on June 13, 1997,

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[4] McMahon claims he did not know that Boyan was the principal of Cornell Elementary School and considered him simply another member of the audience.

and a first amended complaint on March 4, 1999. On July 13, 2000, McMahon filed a second amended complaint alleging illegal seizure in violation of the Fourth Amendment as a federal civil rights claim. (42 U.S.C. § 1983.) The trial court sustained respondents' demurrer on the ground that the federal claim was barred by the statute of limitations.

McMahon argues, first, that the trial court erred because the limitations period on the federal claim was tolled while he pursued remedies under the Claims Act. We reject his contention.

The applicable statute of limitations for civil rights actions brought in California under 42 United States Code section 1983 (section 1983) is the one-year statute of limitations for personal injury actions, as provided in Code of Civil Procedure section 340, subdivision (3). (*West Shield Investigations & Security Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 953.) "'Although state law determines the length of the limitations period, federal law determines when a civil rights claim accrues.' [Citation omitted.] Under federal law, 'a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action.'" (*Knox v. Davis* (9th Cir. 2001) 260 F.3d 1009, 1013.) McMahon's claim accrued on April 30, 1996, the date of his arrest. His second amended complaint, alleging the federal claim, was filed more than four years later.

The Claims Act provides that notice of a claim must be given to a public agency before an action can be brought against it. (Gov. Code, § 945.4.) A civil action must be filed within six months after the agency has rejected the claim. (Gov. Code, § 945.6.) On the other hand, a plaintiff does

not have to file under the Claims Act before initiating a section 1983 action. (*Williams v. Horvath* (1976) 16 Cal.3d 834, 842.) There are no procedural impediments to filing a section 1983 action within the one-year period after the cause of action has accrued.

In *Javor v. Taggart* (2002) 98 Cal.App.4th 795, the court recently held that the section 1983 limitations period is not tolled by the prior filing of a state law claim. We agree with that holding. The *Javor* court reached its conclusion after a review of federal cases considering the issue. In *Ervin v. Los Angeles County* (9th Cir. 1988) 848 F.2d 1018, 1019-1020, the federal appeals court observed that while claims brought under the Claims Act and section 1983 may be factually related, they nevertheless constitute legally distinct wrongs. As noted in *Stone v. City and County of San Francisco* (N.D.Cal 1990) 735 F.Supp. 340, 345: "[I]t is clear that the remedies and procedures in the [Government] Claims Act and the Civil Rights Act are separate and independent. . . . The court concludes that plaintiff's [state law] tort claim is not sufficient to toll the statute of limitations on his section 1983 action. Accordingly, as a matter of law, plaintiff's section 1983 claim is barred by the statute of limitations." Likewise, McMahon's federal claim was not tolled while he pursued remedies under the Claims Act. Because he failed to assert his cause of action under section 1983 within one year of the date of his arrest, the claim is time barred.

Second, McMahon argues that his section 1983 cause of action was tolled pursuant to the general principle of equitable tolling. Under this doctrine, the limitations period is tolled when "the record shows '(1) timely notice to the defendant in filing the first claim; (2) lack of prejudice to defendant in gathering evidence to defend against the

second claim; and, (3) good faith and reasonable conduct by the plaintiff in filing the second claim.'" (*Daviton v. Columbia/HCA Healthcare Corp.* (9th Cir. 2001) 241 F.3d 1131, 1137-1138.) We need not consider the first two prongs because McMahon did not satisfy the third. After conceding that the facts supporting his state tort claim and federal claim are virtually identical, McMahon merely asserts that his conduct in filing the federal claim was reasonable and in good faith. Even if McMahon mistakenly believed satisfaction of the Claims Act was required before filing the section 1983 action, he waited more than three and a half years after denial of the Claims Act application before filing. In *Ervin v. Los Angeles County, supra,* the appellant, who had previously filed a tort claim action in state court, "had not only conducted an investigation of her own into the facts of this case, but had been in possession of a copy of the results of the appellee's own investigation file as well for perhaps as much as a year and a half prior to filing the instant action in federal district court." (848 F.2d at p. 1020.) The federal appeals court rejected her equitable tolling argument, stating: "While it is true, . . . , that the California courts have not clearly defined 'good faith' for purposes of determining the applicability *vel non* of equitable tolling, we conclude that, under the facts as presented here, 'good faith' is to be used in its plain and ordinary sense, and that the appellant's unwarranted delay in filing her federal civil rights claim was neither reasonable nor in good faith." (*Ibid.*) *Ervin's* reasoning is even more compelling here. McMahon waited a longer period, without explanation, to file his second amended complaint.

The Court Did Not Err
In Granting Summary Judgment

McMahon's fourth cause of action alleged a violation of constitutional rights under Civil Code sections 52 and 52.1. His fifth cause of action sought a judicial declaration that "Defendants' action in adjourning the Board meeting when plaintiff was . . . criticizing their policies relating to trash and public safety, and going into closed session and arranging for the arrest of plaintiff, effecting the arrest of plaintiff, and then resuming the Board Meeting after plaintiff's criticism could not longer be heard, was a violation of the Brown Act. [Gov. Code, S 54950.5 et seq.]" McMahon points out that these causes of actions were identical as to all original defendants and asks us to consider the arguments he made in his earlier appeal as to those defendants dismissed by summary judgment. (*McMahon v. Riffer, et al.* (May 22, 2002) A094883 [non-pub. opn.]). We do so, and incorporate by reference our decision in that matter.

Regarding McMahon's fourth cause of action, we concluded that the response to McMahon's conduct at the meeting did not violate the Constitution, and thus is beyond the scope of the Civil Code sections at issue. We noted that Civil Code sections 52 and 52.1, along with other statutes, were enacted in a coordinated effort to combat hate crimes. As we concluded, "Plaintiff's arrest and subsequent brief confinement was not a hate crime; indeed it was no crime at all." (*McMahon v. Alan Riffer, et. al., supra,* A094883 at p. 6.) "Insofar as plaintiff equates the adjournment of the public meeting with infringement upon his First Amendment right of free speech, the inescapable fact is that plaintiff's own conduct caused the adjournment of the meeting." (*Ibid.*) It was not the

expression of his views that caused the adjournment, but his dumping of trash in a school cafeteria.

As to McMahon's fifth cause of action, we concluded the trial court did not abuse its discretion in finding that declaratory relief would be inappropriate. The trial court's conclusion was consistent with its determination that such relief was superfluous to the resolution of the underlying merits already reached. As we stated in our earlier opinion: "The chance that the relevant conduct would recur can properly be regarded as remote, thus the grant of relief was unnecessary in the context of litigation the court was simultaneously ending." (*McMahon v. Alan Riffer, et. al., supra,* A094883 at p. 7.)

Disposition

The judgment is affirmed.

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Corrigan, Acting P.J.

We concur:

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Parrilli, J.

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Pollak, J.

Trial court: Alameda County Superior Court

Trial judge: Honorable Kenneth Burr

Walter K. Pyle for Appellant and Plaintiff

Imai, Tadlock, Keeney & Cordery, LLP, T.G. Tadlock, for Defendants and Respondents.

Court of Appeal, First Appellate District,
Division Three – No. A093980
S113444

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Mar. 19, 2003)

DAVID MCMAHON, Plaintiff and Appellant,

v.

ALBANY UNIFIED SCHOOL DISTRICT et al.,
Defendants and Respondents.

Petition for review DENIED.

GEORGE
Chief Justice
